KERUNTUM SDN. BHD.

v.

THE MINISTER OF NATURAL RESOURCE PLANNING & ORS.

HIGH COURT BORNEO, KUCHING
ABU MANSOR ALI J
[ORIGINATING MOTION NO. KG. 5 OF 1987]
10 AUGUST 1987

ADMINISTRATIVE LAW: *Remedies - Certiorari - Timber licence - Revocation for violation of condition in licence - Writs of certiorari and prohibition - Illegality, duty to act fairly, abuse of discretion - Estoppel - Discretion of Court - Does remedy lie if alternate remedy available - Violation of condition for termination - Effect of same.*

The applicants applied for an order of *certiorari* quashing the decision of the 2nd respondent revoking the applicants Forest Timber Licence No. T/0279; an order of prohibition against the respondents prohibility the granting of any forest timber licence to anyone other than the applicant over the area comprised in the said licence; for cost and other orders the Court deems fit.

The grounds alleged for the applicants were mainly illegality, duty to "act fairly and abuse of discretion".

The applicants had been awarded a license by the 2nd respondent under s. 55 of the Forest Ordinance Sarawak, commencing 10 October 1983 and expiring on 9 October 2008. The licence was issued subject to the term among others, that if the applicant breached any of the terms and conditions of the said licence the 2nd respondent may terminate the licence by giving three months notice in writing. By letter dated 11 March 1987 the 2nd respondent revoked the licence with effect from that date.

The applicant and the respondents submitted at length on the relevance of the arbitration clause in the contract to the present application, on whether the respondents had been in breach of a duty to act fairly, on whether estoppel applied or whether it did not as it was the government that was being penalised, whether the remedy of *certiorari* and prohibition should be granted as they were discretionary remedies especially since an alternative remedy arbitration was open to the applicant to name some.

Held:

[1] Although the licence was issued under s. 55 it is clear that the Directors power in s. 55 had its source in s. 51 and that s. 55 and s. 51 must be read together. Therefore such a licence was non-transferable in terms of s. 51(4) of the Ordinance. It is clear from reading s. 2(2) of the Ordinance that the licence would be invalid if any of the events enumerated in s. 2(2) were to occur but subject to the qualification that it would be invalid unless the Director or other person authorised by him in that behalf directs otherwise. It was therefore not an absolute prohibition.

[2] The effect of (1) above and all the other arguments of the Counsel on both sides would not be considered as they were not relevant in the context of the present application.

[3] It was common ground that the period of 3 months notice which the licence provided for had not been given. An applicant would not be barred from coming to the Court for relief even though there was an alternative remedy or a right of appeal. Without prejudice to the rights of the respondents to take proper action to terminate after due process for all breaches

if proved and without prejudice to the applicant's rights to raise defences which at this stage were irrelevant, it was clear that the respondents had isolated a clear clause in the licence which required 3 months notice in writing to terminate the licence. Therefore *certiorari* would issue and the order of the 2nd respondent quashed. There would be no order as to prohibition as it was unnecessary.

Cases referred to:
CCSU v. Minister for the Civil Service [1984] 2 All ER 935
Re H.K. (an infant) [1967] 2 QB 617
Ketua Pengarah Kastam v. Ho Kwan Seng [1977] 2 MLJ 152
J.P. Berthelsen v. Director-General of Immigration Malaysia & Ors. [1986] CLJ (Rep) 160
A.G. of Hong Kong v. Ng Y.S. [1983] 2 All ER 1346
Wells & Ors. v. Minister of Housing & Local Government & Anor. [1967] 2 All ER 1041
Howell v. Falmonth Boat Construction Ltd. [1951] 2 All ER 278
Public Textiles Bhd. v. Lembaga Letrik Negara [1976] 2 MLJ 58
Chong Chong Wah & Anor. v. Sivasubramaniam [1974] 1 MLJ 38
District Council Central Province Wellesley v. Yagappan [1966] 2 MLJ 177
Lu Su Tsoon Timber Depot v. Southern Estates [1971] 2 MLJ 161
Gathercole v. Smith 17 Ch D 1
White & Ors. v. Kuzych [1951] 2 All ER 435
Badat bin Derani v. Tan Kheat [1953] 19 MLJ 67
Pengarah Tanah & Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd. [1979] 1 MLJ 135
Lai Cheng Cheong v. Sowaratnam [1983] 2 MLJ 113
R. v. London Borough of Hillington ex parte Royco Homes Ltd. [1974] 2 All ER 643

Legislation referred to:
Forest Ordinance (Cap 126) (Sarawak), ss. 2, (2)(a) - (d), 49, 51, (2), (4), (7), 55, 93, (b)
Rules of the High Court 1980, O. 53 r. 1(2)

Other sources referred to:
Administrative law of Malaysia Prof. M.P. Jain
Supreme Court Practice, Mallal's 2nd Edn., p. 642
Stroud's Judicial Dictionary, Vol. 5 (4th Edn.), para 2817

For the applicant - G. Sri Ram (Goh Choo Kee with him); M/s. Abdul-Rahman Chan Jugah Wan Ullok & Co.
For the respondents - Wong Chi Tung; M/s. Yong & Wong Advocates and Fong Joo Chung; M/s. Reddi & Co., Advocates & Solicitors

JUDGMENT

Abu Mansor Ali J:

Pursuant to leave granted the applicant by a notice of motion dated 16 April 1987 applied for orders as follows :

(a) An order of *certiorari* to move into this Honourable Court for the purpose of it being quashed the decision of the 2nd respondent (acting as servant or agent of the 1st and 3rd respondents) made on 11 March 1987, revoking the applicant's Forest Timber Licence No. T/0279;

(b) An order of prohibition prohibiting the respondents and each of them from granting any forest timber licence and/or permit to any person or body other than the applicant over the area comprised in the said licence except in accordance with Clause 16 of the said licence;

(c) The usual other orders as the Court deems fit and costs.

The grounds upon which the order is sought as provided in para. 3 of the statement filed pursuant to O. 53, r. 1(2) of the Rules of the High Court 1980 are:

(i) The revocation by letter dated 11 March 1987 is null and void and of no effect as it was made in violation of the rules of natural justice;

(ii) That applicant had at all material times a legitimate expectation to be heard before revocation which right was denied;

(iii) That the revocation by the 2nd respondent was made under dictation of the 1st respondent or some other authority and consequently illegal, null and void and of no effect as it is contrary to the Forest Ordinance (Sarawak) and/or the terms of the said licence T/0279;

(iv) The 2nd respondent was under a duty to act fairly, the revocation was in breach of such duty and he consequently acted in excess of jurisdiction;

(v) That the revocation was made without or in excess of jurisdiction in that it is not in accordance with the Ordinance and/or terms and conditions of the said licence;

(vi) That the respondents are not entitled to issue a licence to any other person;

(vii) The discretion conferred on 2nd respondent to revoke the said licence is not unfettered. It was exercised arbitrarily and improperly.

All the grounds were subsequently reduced by Counsel for the applicant into three heads - (a) Illegality; (b) Duty to act fairly; and (c) Abuse of discretion.

The facts of the case that led to the applicant making this application can be gathered from the affidavit of Norlia bte Hj. Abdul Rahman affirmed on 24 March 1987. They are as follows. The applicant is a private company limited by shares and carries on trade in timber. On 14 October 1983 the applicant was issued a Forest Timber Licence No. T/0279 ("the licence") by the 2nd respondent under s. 55 of the Forest Ordinance Sarawak ("ordinance") with the approval of the 1st respondent, such licence commencing on 10 October 1983, and expiring on 9 October 2008. The licence area comprises 188,926 hectares of Long Akah State land area.

The said licence was issued subject to terms and conditions set out therein. *Inter alia*, it provided the 2nd respondent may by giving of three months' notice in writing terminate the said licence in the event the applicant failing to comply with any of the terms and conditions of the said licence. It is the contention of the applicant that they have complied with all terms and conditions of the said licence.

However, by a letter dated 11 March 1987 written by the 2nd respondent to the applicant the 2nd respondent revoked the said licence unlawfully, so says the applicant. Hence this application that had been made to us for the above-mentioned orders.

I turn now to the arguments of Counsels. Mr. Sri Ram for the applicant urged on the Court to grant their application for *certiorari* to quash the 2nd respondent's decision on three principal grounds as mentioned: illegality, duty to act fairly, and abuse of discretion. I will deal with the arguments in that order.

Anticipating the argument of the respondents' Counsel, Mr. Sri Ram referred to the common contention of the respondents that applicant is not entitled to the relief prayed for as, so respondents alleged, applicant is in breach of s. 2 of the Forest Ordinance, in breach of the conditions of their licence and lastly are in breach of the applicant's agreement with the State Timber Industry Development Corporation (STIDC).

The applicant's Counsel then referred to respondents' contention that even if there was a breach of duty to give a hearing none the less the applicant is not entitled to the relief because the applicant has no defence to the allegation raised against them by the respondents.

In answer to all the respondents' contention the applicant drew the Court's attention to the fact not in dispute. The principal ground for cancelling and revocation was communicated to the applicant by the 2nd respondent's letter dated 15 May 1987, Exhibit 'G' - (23). The said letter (15 May 1987 - revocation) states:

> ... and I wish to inform you that the legal position quite simply is that by reason of the fact that:
>
> (1) The controlling shares in your company are transferred since the date of the issue of the said licence; and
>
> (2) You have since the date of the issue of the said licence entered into agreements with Maludan Sdn. Bhd., the effect of which is to enable the benefits conferred by the said licence to be enjoyed by Maludan Sdn. Bhd.
>
> Consequently your licence has, under the provisions of s. 2(2) of the Forest Ordinance (Sarawak)(Cap. 126) been since the happening of the first event invalid by operation of law without the necessity of any formal revocation.

Then followed the warning of not to exercise of any rights by the applicant under the said licence.

The applicant's Counsel urged on the Court to note that the above decision was given after the substantive motion in this matter was filed on 16 April 1987. That can be clearly seen as the letter asked the applicant to reconsider their proposed action.

The decision of the 2nd respondent dated 11 March 1987 (11 March 1987 - revocation), Exhibit 'A2' in encl. (2A), that the applicant seeks to quash reads:

> Dear Sir,
>
> Forest Timber Licence T/0279
>
> I have been directed to inform you that your Forest Timber Licence No. T/0279 is hereby revoked.
>
> Yours sincerely
>
> sgd: Leo Chai
> Director of Forests, Sarawak

It is the contention of the applicant that the 11 March 1987 revocation is null and void and of no effect as it was made in violation of the rules of natural justice.

The applicant's Counsel contended that there are three types of forest dealt with by the ordinance. Section 49 thereof the Ordinance deals with or regulate forest reserves and protected forest. Whilst s. 51 of the Ordinance deals with State land forests other than s. 49 forests and according to applicant, lastly, the third kind, the forest is regulated under s. 55

thereof. The applicant's licence is a licence made under s. 55 of the Forests Ordinance. This is clear from p. 9 of Forest Timber Licence 'A1' attached to affidavit (2A) where it recites the "Director in the exercise of his powers under s. 55 of the Forests Ordinance with the approval of the Minister grants." The licence is signed by the Director and the Minister is also a signatory. Counsel further submitted that in 15 May 1987 revocation letter alleging the that the licence had been transferred such allegation it appears can only be founded on two grounds under s. 2(2)(b) - controlling shares in the company had been transferred, and s. 2(2)(b) - the licence holder entering into agreement with any other person enabling the permit to be enjoyed by other persons.

It is the contention of applicant's Counsel that s. 2(2) is wholly irrelevant to applicant's licence. This is hotly disputed by the respondents. The applicant's Counsel submits that a distinction is to be drawn between the situation on the one hand where the ordinance in s. 2(2) declares the licence to be not transferable and the position where the licence itself declaring it as non-transferable. Section 2(2) provides:

> (2). Where a licence or a permit is, under this Ordinance, declared not to be transferable, the licence or permit shall, unless the Director or a person authorised by him in that behalf otherwise directs, be invalid if -
>
> (a) ...
>
> (b) in the case of a licence or permit issued to a company, the controlling shares in the company are transferred;
>
> (c) ... or
>
> (d) the holder thereof enters into an agreement with any other person, the effect of which is to enable the benefits conferred by the licence or permit to be enjoyed by any other person.

The applicant's Counsel contends that in the case of licence issued under s. 51 the Ordinance itself declares in s. 51(4) thereof that the licence is non-transferable. Hence, the applicant says the necessity of s. 51(7) which make it an offence to act in contravention of s. 2(2) providing for a fine and the Director may terminate such licence in accordance with s. 93. Whereas s. 55 under which the licence 'A1' was issued does not declare a licence governed by it to be non-transferable. For the above reason the applicant says that s. 2(2) does not apply to licence issued under s. 55. We will refer to this at a later stage.

The applicant conceded that they did not obtain the permission or approval of the 2nd respondent before entering into logging contract with or awarding such to Maludan. Be that as it may, applicant's Counsel says that under Clause 24 of the licence 'A1' the Director may terminate the licence by three months' notice in the event of any breach. It is common ground that no three months' notice was given by the respondent. Alternatively, he says in the event of a breach either party may refer any dispute to arbitration. It is the applicant's contention that if respondents' allegation is that they have breached Clause 15 or Clause 30 then the proper procedure to be adopted is to take the dispute to arbitration. Since there is provision for arbitration the applicant contends that all allegations of alleged breaches so far made are irrelevant to this proceeding for *certiorari*.

The applicant submitted further that a public authority is under a duty to act according to law and a decision in contravention of that is null and void. The applicant cited *CCSU v. Minister for the Civil Service* [1984] 2 All ER 935 where the House of Lords upheld the principle that there is an obligation on the Minister's part to act fairly by first consulting the

GCHQ staff before withdrawing the benefit of trade union membership. Mr. C.T. Wong, leading Counsel for the respondents, in answer to applicant's contention as to alleged illegality submitted that s. 2(2) of the Forest Ordinance is relevant and applicable to the said s. 55 licence. It is common ground that on 4 October 1983 the director with the Minister's approval granted licence to Keruntum Sdn. Bhd. ("Keruntum") to take forest produce from an area of 188,926 hectares of State land for a period ending on 9 October 2008.

It is also common ground that Clause 31 of the licence provides that the licence is not transferable. As so conceded by the applicants the transfer of shares in the Keruntum had taken place and no consent of the 2nd respondent was obtained before the shares were so transferred until Keruntum applied by letter dated 6 September 1985 'A7' in (19). The respondent submitted that before that they had no way of knowing that the shares had been transferred.

In 'A7' Keruntum did say that the application was duly made under s. 2(2) of the Ordinance for consent of the 2nd respondent to approve the transfer as follows:

Original shareholders:

Haji Mohd. Deli Abdul Rahman	1
Haji Mohamad Louis Ali	1
	2

Transfer of Shares:

Haji Mohd. Deli Abdul Rahman to Solana Sdn. Bhd.	1
Haji Mohd. Louis Ali to Solona Sdn. Bhd.	1
	2

Allotment of Shares:

Temenggong Baya Malang	500
Pou (Baram) Sdn. Bhd.	2,500
Solona Sdn. Bhd.	6,998
	9,998

It is the contention of the respondents, a fact applicant conceded already, the controlling interest in the applicant's company was already transferred and was transferred on 14 December 1983 without the consent of the 2nd respondent. It is clear and even provided the reason why applicant wrote 'A7' dated 6 September 1985. It is the contention of the respondents as well that because the controlling interest in the applicant company had been so transferred on 14 December 1983 without the 2nd respondent's consent the licence T/0279 is therefore *ipso facto* invalid and *ipso jure* void. The respondent also went on to allege that the effect of two logging agreements between Keruntum and Maludan dated 9 February 1985 (Exhibit 'E' in (23)) and between Maludan Sdn. Bhd. and sub-contractor Sarion Shipping Bhd. (SARION) dated 8 February 1986 (attached to 'J' in (23)) is that the benefits under the said licence have been passed to Sarion. The respondents went on to further allege that as no prior direction or authorisation had been obtained from the 2nd respondent the applicant therefore had acted in breach of s. 2(2) of the Ordinance and as such had invalidated the licence.

Perhaps I should now consider whether s. 2(2) of the Ordinance is relevant in considering the said licence. It would appear after reading the Ordinance as a whole it envisages only two types of forest: forest reserved and protected forests and State land forest. It is also clear that the licence we are considering concerned State land forest.

If I am correct in my reading, the intention of the Ordinance is that the ordinary day-to-day running and administering of the forest under the ordinance is left to the director. As such under s. 51(2) in respect of State land forest other than reserved or protected forest he is authorised by the Ordinance, to ensure some flexibility, to issue licences or permits not exceeding one year. His prohibition from issuing such a licence exceeding one year, however, is followed by the permissive words in s. 51(2) itself, "expect with the express permission of the Minister and under such conditions as he may approve." It would appear that the words quoted bear a direct reference to s. 55 enacted in amplification to and explanation of the director's powers in s. 51. Section 55 thereof reads:

> Nothing contained in s. 51 or 52 shall be deemed to prohibit the director, with the approval of the Minister, from issuing licences under special conditions, and for periods exceeding one year, and in cases where he may deem such licences expedient.

It is clear therefore that the Director's power in s. 55 has its source in s. 51 and that s. 55 and s. 51 ought therefore to be read together. I may even go as far as to say that s. 55 licence is in substance a hybrid of or another type of s. 51 licence where the Minister need give approval as it is for a period of more than one year. Since it is a s. 51 licence it is therefore regulated by s. 51(4) of the Ordinance that it is not transferable subject to what I will later say on transferability. Since I take the view that s. 55 licence is in substance an extension of a s. 51 licence and declared by s. 51(4) to be non-transferable under s. 2(2) of the Ordinance. When such licence is, under the Ordinance, declared not to be transferable does it mean it is absolutely non-transferable? Reading s. 2(2) it is quite clear that such licence shall be invalid if any of the events as enumerated in (a) to (d) occurs but subject to the important qualification that it shall be invalid unless the director or a person authorised by him in that behalf otherwise directs. It is therefore not an absolute prohibition. Perhaps I also need to say, in view of Exhibit 'C' in encl. (23), that transfer had taken place for which permission was being sought if Keruntum had infringed para. (b) of s. 2(2) and in view of the referred to agreements dated 9 February 1985, Exhibit 'E' in encl. (23), and also Keruntum had infringed para. (d) of s. 2(2). Can it be said that there is no contrary direction from the 2nd respondent thus rendering the licence T/0279 invalid?

For the respondents Mr. C.T. Wong submitted that the 2nd respondent's use of the word "revoked" in letter dated 11 March 1987 has been a wrong use of the word and the correct position was in 15 May 1987 revocation 'G' in encl. (23) that the licence was void by operation of law. At this stage these points will only be finally considered depending whether I consider them relevant for *certiorari*.

I now come to the next point of applicant's submission which was even if the applicant is guilty of breaches (not admitted by applicant) the respondent is still not entitled at this stage to rely on those breaches as there is a duty imposed on the respondents to act fairly towards the applicant. The applicant submitted that they had a legitimate expectation to be heard in answer to the allegation that they had broken the provision of s. 2(2). They expect the respondents would lay a charge and the applicant would be given the opportunity to rely and the respondents could even institute a prosecution and even if convicted the applicant may still apply for relief under s. 93(b) against termination of the licence by the 2nd

respondent. The applicant says they also expect to go to arbitration on the respondent giving them three months' notice which the respondent never gave. The applicant further says s. 51(7) has to be read with s. 93. On the subject of duty to act fairly the applicant cited *Re H.K. (an infant)* [1967] 2 QB 617; *Ketua Pengarah Kastam v. Ho Kwan Seng* [1977] 2 MLJ 152, *J.P. Berthelsen v. Director-General of Immigration Malaysia & Ors.* [1986] CLJ (Rep) 160, both decisions turn on the right to be heard.

In reply it is the contention of the respondent that on the happening of any of the events enumerated in s. 2(2)(a)-(d) the licence had been rendered invalid by operation of law without the necessity of a formal revocation. If an enquiry is required it would amount to no more than examining the facts leading to the events and ascertaining whether the circumstances do or do not attract the operation of s. 2(2) of the Ordinance rendering the said licence invalid by operation of law. The applicant need not be heard, the respondent says.

In the course of the applicant's Counsel's submission under this heading of duty to act fairly, applicant's Counsel also raised the issue of estoppel. He submitted that where a public authority has by word or conduct led a private person to be believe that a certain state of affairs exist or that a certain action will or will not be taken then such authority will be estopped from adopting a contrary position unless consequences are incompatible with statute. He cited a few authorities: *A.G. of Hong Kong v. Ng Y.S.* [1983] 2 All ER 1346; *Wells & Ors. v. Minister of Housing & Local Government & Anor.* [1967] 2 All ER 1041.

He further submitted in the instant case there is no formality to be observed. We presume Counsel is referring to s. 2(2) contrary direction can be by conduct or orally. The Ordinance did not specify directly the mode of contrary direction.

The applicant's Counsel drew the Court's attention to instances (in encl. (19) where respondents' estoppel could amount to:

(a) In Keruntum's letter dated 5 September 1985 'A6' approval was sought to appoint Maludan Sdn. Bhd. as a logging contractor. In fact in Exhibit 'G' in (23) this was the issue taken that there has been a breach of the licence made under s. 2(2) of the Ordinance:

(b) In 'A7' letter dated 6 September 1985 Keruntum applied for approval for the transfer of shares;

(c) In 'A8' letter dated 30 May 1986 where information was put before 2nd respondent regarding transfer, logging agreement and for permission to enter and work the coupe;

(d) In 'A9' letter dated 11 July 1986 from 2nd respondent's office where approval was given, though by an officer in 2nd respondent's office, to submission of survey data and profile drawings for M.1 in Coupe 2 and asking applicant to apply to Miri Office so that road construction may commence within the coupe.

In 'A10' pp. 13, 14, 15 and 20 pertain to permits to work coupe and particularly in p. 20 permission was granted on 14 March 1987 and 55 blocks were allowed to be worked. An officer sub-ordinate to 2nd respondent had authorised the permit. Then in Exhibit 'A10' letter dated 7 November 1986 the licence book was returned to applicant after updating of the premium.

Applicant's Counsel submitted that if 2nd respondent had not approved it was reasonable to expect 2nd respondent to instruct his subordinate to seize the licence as no permission was obtained to have benefit of licence transferred. He also submitted s. 2(2) of the Ordinance

does not require prior direction to the contrary - it can come at any time. Applicant is not seeking an enlargement of a limited interest into a larger estate. Applicant is also not seeking to enforce a proprietary estoppel. All that applicant says is that the respondent has exercised his discretionary power under s. 2(2) of the Ordinance and they are estopped from saying that they have not so exercised it.

For the respondent, Mr. C.T. Wong quoted Prof. M.P.Jain "*Administrative Law of Malaysia*" and says that the doctrine of estoppel is not generally available against the government and it is not bound by any representation or assurance on its behalf if the act or the representation involves the breach of the statute. Respondent cited *Howell v. Falmonth Boat Construction Ltd.* [1951] 2 ALL ER 278, 285 where a certain operation may not be undertaken by the concerned department that no such licence was necessary was held not to be of any effect as such assurance could not have the effect of overriding the statute or legalising the particular operation in the absence of a licence. The respondent also cited *Public Textiles Bhd. v. Lembaga Letrik Negara* [1976] 2 MLJ 58 where a plea by representation cannot be pleaded against a public corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public.

The *Public Textiles Bhd. v. Lembaga Letrik Negara* (*supra*) appears to provide the answers to the question can estoppel be raised against the respondents. At p. 62 of the cited case, Raja Azlan FJ (as he then was) said:

> In *Kok Hong v. Leong Cheong Kweng Mines Ltd.,* the Privy Council had occasion to consider Maritime Electric Co.'s case with reference to the plea of estoppel in the face of a statute and explained it in this way (p. 308):
>
> > Thus a corporation on which there was imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppel *in pais* from performing its duty and asserting legal rights accordingly.
>
> and
>
> > Gives a 'statutory obligation of an unconditional character' it is not open to the Court to allow a party bound by the obligation to be barred from carrying it out by the operation of an estoppel.

In a similar way these points of arguments on estoppel I will only finally consider depending on whether I regard them as relevant in this proceedings for *certiorari*.

The last complaint raised by the applicant was the 2nd respondent's abuse of discretion. The applicant contended that in Exhibit 'A2' in (2A) letter dated 11 March 1987 in revoking the said licence the Director said he had been directed. Applicant's Counsel says the 2nd respondent must act personally. Applicant cited *Chong Chong Wah & Anor. v. Sivasubramaniam* [1974] 1 MLJ 38, 40 where Suffian CJ (as he then was) held under s. 9 of the Control of Imported Publications Ordinance 1958, ASP Chong Chong Wah as the raiding officer was required personally to suspect and to come to an opinion that the book was a prejudicial publication. Similarly even letter 'G' dated 15 May 1987 in encl. (23) where respondent stated that the applicant had acted contrary to s. 2(2) of the Ordinance and the licence was invalid. The applicant contends that here the 2nd respondent, as a public officer, should personally form an opinion and to make the determination. Applicant's Counsel described Exhibit 'G' in encl. (23) as a tardy and belated and *espost facto* attempt to justify the unjustifiable.

In answer to the applicant's submission the respondent submitted that s. 2(2) is an absolute and imperative provision. Upon the happening of any of the events stipulated therein the licence shall be rendered invalid by operation of law. The director has neither the power nor the discretion to say otherwise. This will also remain if I consider it relevant.

It remains only now to refer to the submission of Counsel for the respondents, Mr. J.C. Fong, to the effect that even assuming that the applicant is entitled to a right to be heard and was not given the opportunity and thereby infringed the rules of natural justice he asked will *certiorari* and prohibition be available to the applicant? The respondents' Counsel Mr. Fong, says that the remedy of *certiorari* and prohibition being discretionary remedies the Court may withhold it if it thinks fit. I accept that as a correct statement of the law. He goes on to submit that the remedy sought by the applicant should be denied on two principal grounds; one being the conduct of the applicant and because of special circumstances. He cited Mallal's *Supreme Court Practice*, 2nd Edn., p. 642, where it was said that a writ of *certiorari* will always issue unless the applicant has by his conduct precluded himself. Then in *District Council Central Province Wellesley v. Yagappan* [1966] 2 MLJ 177, 183 where the conduct of the objector is relevant in deciding whether to grant the discretionary remedy.

Mr. Fong directed our attention to Exhibit 'I' in encl. (34) a letter dated 8 December 1983 from the respondent Ministry to the applicant that the applicant had to meet other conditions to be stipulated by the Sarawak Timber Industries Development Corporation (STIDC) as to premium and the rates and conditons thereof and to signify their acceptance of these conditions direct to STIDC. In the same encl. (34) in Exhibit 'J' the STIDC by letter dated 30 December 1983 stipulated the conditions to be met by the applicant the principal condition of which was Clause X that the applicant shall not transfer assign or sell or otherwise encumber its right or benefits to fell timber from the licensed area without the prior approval of the Corporation and Clause XI without the prior approval of the corporation - (a) the company shall not allot issue or transfer any share of the company; (b) the company undertakes that the company's shareholders shall not transfer or assign mortgage or pledge or otherwise encumber or deal with any of their shares in the company.

Mr. Fong repeated what we already know that at the time when the 2nd respondent with the approval of the Minister issued the licence the shareholders of the applicant were only two: Haji Mohd. Louis Ali and Haji Deli Abdul Rahman. Haji Mohd. Louis Ali was the one who signed the applicant's application (see affidavit of Leo Chai, para. 3 of encl. (23) and para. 6 and 7 of the supplementary affidavit of Leo Chai, encl. (34). He said the licence or the benefit thereof was to be held by the applicant and to remain so through their complete control of the applicant company. Then by letter dated 6 September 1985, Exhibit 'A7' in (19), copying their letter to STIDC, the applicant advised that the transfer of two shares of Haji Deli and Haji Mohd. Louis Ali already took place to Salona Sdn. Bhd. (Salona). Mr. Fong cited *Lu Su Tsoon Timber Depot v. Southern Estates* [1971] 2 MLJ 161 (Bundle 'B' p. 18) in support of his contention that in the absence of prior approval by the Director the applicant had breached s. 2(2) of the Ordinance and he cited Stroud's *Judicial Dictionary*, Vol. 5 (4th Edn.), para. 2817 and *Gathercole v. Smith* 17 Ch D1 which say that the meaning of transfer is to be given its widest meaning.

Mr. Fong then submitted on the effect of breaching the Ordinance and the conditions of the licence and conditions imposed by STIDC stipulated by the Minister. Also before prior approval of the Minister was obtained the applicant had already by agreement appointed Maludan Sdn. Bhd. The conferring of these rights as such to Maludan, Mr. Fong submits,

invalidates the licence in view of s. 2(2) of the Ordinance. Further as has been seen applicant signed a contract to extract timber with Sarion Shipping Sdn. Bhd. (Sarion) and this was again without the 2nd respondent's or the Minister's approval clearly having the same effect. As in 'J' in encl. (34), the STIDC's letter, Clause IX required the applicant to set up a sawmill. By March 1987 when licence 'A2' in encl. (2A) was issued 42 months had elapsed and no sawmill was erected nor did applicant establish other timber processing activities, he submitted.

In concluding his submission Mr. Fong submitted, under this heading of conduct, rather forcefully I would say, that the applicant's conduct totally disregarded the terms of conditions of licence and the statutory provisions and in answer to applicant's submission, he submitted that the matters are far from *ex post facto* justification of the withdrawal of the licence as alleged and such conduct, he submitted, are such as not to merit the Court exercising its judicial discretion in applicant's favour.

On special circumstances Mr. Fong submitted that even assuming s. 2(2) of the Ordinance does not apply from what had transpired there are clear breaches of the licence 'A1' attached to encl. (2A). By reason of Clause 15 and Clause 31 the Director under Clause 24 may terminate the agreement by giving of three months' notice. He submitted that in the present case the applicant under Clause 30 should go to arbitration and not apply for *certiorari* prayed for. The respondent cited *White & Ors. v. Kuzych* [1951] 2 All ER 435 which held although the decision/ conclusion which the respondent sought to be challenged was tainted by bias and in defiance of the rules of natural justice none the less the conclusion was subject to appeal to the Federation which the respondent was by contract bound to pursue. He cited *Badat bin Derani v. Tan Kheat* [1953] 19 MLJ 67 where *certiorari* was refused because appellant had not appealed to High Court.

Mr. Fong lastly submitted on the effect of an order for *certiorari* if it were to be granted. Such an order to the applicant would be to tie the area until 2008 and who would benefit from this restoration? Mr. Fong answers that question as he posed. In substance the Court would be giving the forest to three current shareholders whose participation in the company had not had the approval of the 2nd respondent and the Minister and the STIDC. It would be like the Court giving the licence to applicant for the benefit of Sri Temenggong, Salona, Pou (Baram) and Sarion. In doing so, Mr. Fong submitted, the Court would be exercising a statutory function conferred by s. 55 of the Ordinance giving benefits to people who the 2nd respondent, the Minister and STIDC may not approve. The respondent cited *Pengarah Tanah & Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135, 149 where it is stated that "the power of the Court to interfere is not to override the decision of the local authority but to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it."

Mr. Sri Ram in reply submitted that as far as conduct is concerned the applicant's failure to go to arbitration does not in any way preclude applicant from obtaining the remedy of *certiorari*. He maintained that the respondent's act of revoking the licence is still a nullity and in breach of the provision of the licence. Alternatively he submitted that the failure to exhaust the remedy under the agreement is also no bar to *certiorari*. The applicant cited *Lai Cheng Cheong v. Sowaratnam* [1983] 2 MLJ 113. The applicant also cited *R. v. London Borough of Hillington ex parte Royco Homes Ltd.* [1974] 2 All ER 643 where *certiorari* was granted as a matter of law and the matter was clear on the face of the record. Applicant submitted where it was a nullity there was no need to appeal.

After hearing the submission of Counsel from both sides I have of course to answer whether I would still exercise my discretion in granting an order of *certiorari* in the circumstances that had transpired up to the order of the 2nd respondent sought to be quashed. On the remedy of *certiorari* I cannot do better than refer to the judgment in *Lai Cheng Cheong v. Sowaratnam* [1983] 2 MLJ 113, 116 when Wan Sulaiman FJ (as he then was) says:

> We were also referred to a passage in the 4th Edn., of 'Administrative Law' by H.W.R. Wade at pp. 36 to 38 which we found most illuminating. The relevant portion is reproduced hereunder-
>
> > Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the Court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the Court is simply performing its ordinary functions in order to uphold the rule of law. The basis of judicial review, therefore, is common law. This is none the less true because nearly all cases in administrative law arise under some Act of Parliament. Where the Court quashes an order made by a Minister under some Act it will normally use its common law power to declare that the Act did not entitle the minister to do what he did.
> >
> > Where the proceeding is an appeal, some superior Court or authority will consider the decision of some lower Court or authority on its merits...
> >
> > Judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed the Court in review is concerned only with the question whether the act or order under attack should be allowed to stand or not.

It ought to be mentioned this case also answers the respondents' submission as it also decides that the applicant is not barred from coming to this Court for relief even though there was alternative remedy or there is a right of appeal.

In exercise of my discretion and without prejudicing the rights of the respondents in taking proper action to terminate after due process for all breaches if proved and without prejudicing applicant's rights to raise the defences available to them which at this stage I rule to be irrelevant to this *certiorari* proceedings, I ask myself the crucial question, that is, in the face of the clear clause in the licence that the applicant is entitled to a three months' notice can the licence be revoked by the 2nd respondent's letter of 11 March 1987 or 15 May 1987? The clear answer I get is that the 2nd respondent is or all respondents are bound by contract to give the applicant three months' notice to terminate the licence. It is an entrenched and vested right which the respondents have undertaken by contract to be bount to respect and will not be allowed to go back on. Consonant with our duty we have to say it cannot be taken away.

I have, threfore, no hesitation in finding for the applicant in their prayer (a) that *certiorari* is to issue. The impugned order of the 2nd respondent is quashed and and I do so order accordingly with costs to the applicant to be taxed. I find it is unnecessary to make the order as to prohibition and there shall be no order on that prayer.

Also found at [1988] 2 CLJ 295